92-1465

Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

No. 92-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PAUL CASPARI, Superintendent,
Missouri Eastern Correctional Center,
and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

Petitioners,

vs.

TERRY D. MCINTYRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioners

QUESTIONS PRESENTED

I.

WHETHER THE RULE OF GRADY V. CORBIN, 495 U.S. 508 (1990), CAN BE APPLIED RETROACTIVELY TO A HABEAS CORPUS PETITIONER BECAUSE THE DOUBLE JEOPARDY CLAUSE'S BAR TO A SUCCESSIVE PROSECUTION IS A CATEGORICAL GUARANTEE OF THE CONSTITUTION.

II.

WHETHER THE DOUBLE JEOPARDY CLAUSE, AS INTERPRETED IN GRADY V. CORBIN, 495 U.S. 508 (1990), (1) PROHIBITS THE INTRODUCTION AT TRIAL OF "EVIDENCE OF OTHER CRIME" WHERE THAT CRIME HAS ALREADY BEEN PROSECUTED OR (2) PROHIBITS THE PROSECUTION OF A CRIME WHERE EVIDENCE OF THAT CRIME WAS ADDUCED AT AN EARLIER TRIAL AS "EVIDENCE OF OTHER CRIME."

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. vi

OPINIONS BELOW. 1

JURISDICTIONAL STATEMENT. 3

CONSTITUTIONAL PROVISIONS 5

STATEMENT OF THE CASE 7

ARGUMENT

I. Whether the rule of **Grady v. Corbin**, 495 U.S. 508 (1990), can be applied retroactively to a habeas corpus petitioner because the Double Jeopardy Clause's bar to a successive prosecution is a categorical guarantee of the Constitution 14

II. Whether the Double Jeopardy Clause, as interpreted in **Grady v. Corbin**, 495 U.S. 508 (1990), (1) prohibits the introduction at trial of "evidence of other crime" where that crime has already been prosecuted or (2) prohibits the prosecution of a crime where evidence of that crime was

adduced at an earlier trial as "evidence of other crime" 31

CONCLUSION. 50

APPENDIX (Under separate binding)

INDEX TO PETITIONER'S APPENDIX

1. Opinion of the United States Court of Appeals for the Eighth Circuit, filed September 4, 1992, in **Terry D. McIntyre v. Myrna Trickey**, No. 89-2700. A-1

2. Opinion of the United States Court of Appeals for the Eighth Circuit, filed July 15, 1991, in **Terry D. McIntyre v. Myrna Trickey**, No. 89-2700. A-29

3. "Report and Recommendation" of Magistrate David D. Noce, filed November 2, 1988, in **Terry D. McIntyre v. Myrna Trickey and William L. Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C.E.D.E.D.) A-65

4. Order of United States District Court for the Eastern District of Missouri sustaining and adopting the Magistrate's Report and Recommendation, filed November 22, 1988, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No. 88-1708C(2)

(U.S.D.C.E.D.E.D.), filed November 22, 1988. A-72

5. Order of Magistrate Noce, filed April 24, 1989, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C.E.D.E.D.). A-74

6. "Report and Recommendation of United States Magistrate," filed August 7, 1989, in **Terry D. McIntyre v. Myrna Trickey and William L. Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C.E.D.E.D.). A-80

7. Order of District Court sustaining and adopting the Magistrate's Report and Recommendation, filed September 18, 1989, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C.E.D.E.D.). A-101

8. Memorandum and Order denying certificate of probable cause, filed October 17, 1989, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No 88-1708C(2) (U.S.D.C.E.D.E.D.). A-103

9. Order granting certificate of probable cause, filed May 7, 1990, in **Terry D. McIntyre v. Myrna Trickey**, No. 89-2700EM (U.S. Ct. App. 8th Cir.). A-106

10. Opinion of the Missouri Court of Appeals, Eastern District, filed June 30, 1987, in **State of Missouri v. Terry D. McIntyre**, No. 51914. A-108

11. Opinion of the Missouri Court of Appeals, Eastern District, filed February 16, 1988, in **State of Missouri v. Terry D. McIntyre**, No. 53084. A-115

12. Order of the United States Court of Appeals for the Eighth Circuit denying rehearing or rehearing en banc in **Terry D. McIntyre v. Myrna Trickey**, No. 89-2700EMSL, filed December 10, 1992. A-126

13. Petition for habeas corpus relief filed on September 2, 1988. A-127

14. "Motion to Alter or Amend Judgment," served on November 30, 1988, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D C.E.D.E.D.). A-137

TABLE OF AUTHORITIES

Pages

Brown v. Ohio, 432 U.S. 161 (1977). 10

Butler v. McKellar,
494 U.S. 407 (1990). 22, 25

Caspari v. McIntyre,
112 S.Ct. 1658 (1992). . . .1-2, 12,
31, 37

Dowling v. United States,
493 U.S. 342 (1990). 37, 42,
45, 47, 49

Grosso v. United States,
390 U.S. 62 (1968) 20

Grady v. Corbin,
495 U.S. 508 (1990). . . . . passim

Griswold v. Connecticut,
381 U.S. 479 (1965). 20

Harris v. United States,
237 F.2d 274 (8th Cir. 1956) 29

Johnson v. Howard, 963 F.2d 342
(11th Cir. 1992) 16, 17

Kenley v. Armontrout, 937 F.2d 1298
(8th Cir.), cert. denied,
112 S.Ct. 431 (1991) 43

Loving v. Virginia,
388 U.S. 1 (1967). 20

Mackey v. United States,
401 U.S. 667 (1971). 16-17, 20, 23

McIntyre v. Trickey, 938 F.2d 899 (8th Cir. 1991), vacated, 112 S.Ct. 1658 (1992), on remand, 975 F.2d 437 (8th Cir. 1992). 1, 17, 37, 39, 47

North Carolina v. Pearce,
395 U.S. 711 (1969). 25, 27

Penry v. Lynaugh,
492 U.S. 302 (1989). 17, 21, 22, 23, 27, 30

Robinson v. Neil,
409 U.S. 505 (1973). 28

Saffle v. Parks,
494 U.S. 484 (1990). 24

Sawyer v. Whitley,
112 S.Ct. 2514 (1992). . . . 19, 21

Simmons v. Lockhart, 915 F.2d 372 (8th Cir. 1990). 19

Smith v. Black,
904 F.2d 950 (5th Cir. 1990), vacated, 112 S.Ct. 1463 (1992). 24

Stanley v. Georgia,
394 U.S. 557 (1969). 20

State v. Kenley, 693 S.W.2d 79 (Mo. banc 1985), cert. denied, 475 U.S. 1098 (1986) 33, 43-44

State v. Kenley, 701 S.W.2d 185 (Mo.App., S.D. 1985) 44

State v. McIntyre, 749 S.W.2d 420 (Mo.App., E.D. 1988) 7-10, 36

State v. McIntyre, 735 S.W.2d 111 (Mo.App., E.D. 1987) 35

Street v. New York, 394 U.S. 576 (1969). 20

Taylor v. Whitley, 933 F.2d 325 (5th Cir. 1991), cert. denied, 112 S.Ct. 1678 (1992). . . . 29

Teague v. Lane, 489 U.S. 288 (1989). . . . . passim

United States v. Broce, 488 U.S. 563 (1989). 28

United States v. Chippas, 942 F.2d 498 (8th Cir. 1991) 26

United States v. Connelly, 503 F.2d 520 (8th Cir. 1974) 29

United States v. Felix, 112 S.Ct. 1377 (1992). . . . passim

United States v. Felix, 926 F.2d 1522 (10th Cir. 1991), rev'd, 112 S.Ct. 1377 (1992) 12, 13

United States v. Oritz-Alarcon, 917 F.2d 651 (1st Cir. 1990), cert. denied, 111 S.Ct. 2035 (1991) 26

United States v. Salerno,
964 F.2d 172 (2d Cir. 1992). 17-18, 18, 27

Wickham v. Dowd,
914 F.2d 1111 (8th Cir. 1990), cert. denied, 111 S.Ct. 2897 (1991) . . . 24

Constitutional Provisions

U.S. Const., amend. v 5

U.S. Const., amend. xiv, § 1. . . 5-6

Statutes and Rules

28 U.S.C. § 2254. . . . . 4, 10

Supreme Court Rules 10.1. . . . . 14, 34

Fed. R. Civ. P. 59(e) 11

Fed. R. Evid. 404(b). 33, 49

Section 541.033, RSMo 1986. . . . 46

Section 569.080, RSMo 1986. . . . 32, 34

Section 570.030, RSMo 1986. . . . 7, 32, 34

Section 570.030.3(3)(a), RSMo 1986. 7

No. 92-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PAUL CASPARI, Superintendent,
Missouri Eastern Correctional Center,
and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

Petitioners,

vs.

TERRY D. MCINTYRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The panel opinion of the United States Court of Appeals granting the writ of habeas corpus is reported at 975 F.2d 437 (8th Cir. 1992) and is published in the Appendix at A-1. The Order of this Court remanding the cause to the Court of Appeals is published at 112 S.Ct. 1658

(1992). The previous panel opinion of the United States Court of Appeals granting the writ of habeas corpus is reported at 938 F.2d 899 (8th Cir. 1991) and is published in the Appendix at A-29. The order sustaining and adopting the magistrate's report and recommendation is not reported, but is included in the Appendix (A-101). The magistrate's report and recommendation is not published, but is included in the Appendix (A-80). The earlier orders of the district court and the magistrate are also unpublished, but are included in the Appendix (A-65, 72).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on September 4, 1992 (A-1). The petition for rehearing or rehearing *en banc* was denied by the Court of Appeals on December 10, 1992 (A-126). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rules 13.1 and 13.4, the present petition for writ of certiorari was required to be filed by petitioners[1] within ninety days.

---

[1]Petitioner Paul Caspari, Superintendent of the Missouri Eastern Correctional Center, is the successor in office to Myrna Trickey, former Superintendent of the Missouri Eastern Correctional Center, and is respondent's current custodian. Under 28 U.S.C. § 2254, Rule 2(a), and Supreme Court Rule 35.03, Paul Caspari is a proper petitioner before this Court. Since the sentence respondent challenged was a sentence to be served in the future, Missouri Attorney General Jeremiah W. (Jay) Nixon is also a proper petitioner before this Court. 28 U.S.C. § 2254, Rule 2(b); Supreme Court Rule 14.1(b).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was found guilty by a jury of stealing a motor vehicle and was sentenced by the Court as a persistent offender to a term of ten years' imprisonment to be served consecutively to an existing ten-year sentence (A-30-31). Section 570.030.3(3)(a), RSMo 1986. The conviction and sentence for stealing were imposed by the Circuit Court of St. Louis County, Missouri.

The circumstances surrounding respondent's crime were summarized by the Missouri Court of Appeals on direct appeal.

> On November 22, 1985, a man who identified himself as "Johnny" went into Kirkwood Mitsubishi and told salesman Steven George he wanted to test-drive a Mitsubishi Galant. While George went to get the keys to a Galant demonstrator, "Johnny" was left alone to look at a Galant on the showroom floor. The showroom car had its keys in its ignition, and those keys were similar to the

keys to the demonstrator Galant.

After a test-drive, "Johnny" returned a set of Galant keys to George who returned them to the dealership "key board." About fifteen minutes later, George and another salesman discovered the demonstrator Galant was missing and the keys from the board were from the showroom Galant at which "Johnny" had been looking, not the demonstrator. Two days later, St. Louis City police officers saw the Galant, which was listed on a "hot sheet" of stolen cars. After a pursuit, police officers stopped the Galant and arrested defendant, who was driving, and a passenger. There was a set of keys in the vehicle's ignition.

Jack Schneedle, a Kirkwood police officer, prepared a photo array to show to automobile salesman George. Two of the photographs, obtained from the St. Louis Police Department, were of defendant and the passenger arrested with him; three were from the Kirkwood Police Department files. On November 27, 1985, Detective Schneedle took the five photographs to the Kirkwood Mitsubishi dealership, showed them to George and asked him if any of the photos were of the person who was in the

dealership and took a drive in the demonstrator Galant on November 22, 1985. Schneedle did not tell George anything else. George identified the photograph of defendant as "Johnny."

On December 19, 1985, defendant was charged with first-degree tampering for operating the Galant in the City of St. Louis. He was found guilty by a jury on June 5, 1986, and sentenced July 11, 1986, by the court as a prior and persistent offender to ten years' imprisonment. [The Missouri Court of Appeals] affirmed his tampering conviction on appeal. **State v. McIntyre**, 735 S.W.2d 111 (Mo.App. 1987) [A-108].

On August 9, 1986, defendant was charged with stealing the Galant based on his alleged appropriation of it from Kirkwood Mitsubishi. His motion to dismiss the stealing charge, based on a claim of double jeopardy, was denied February 23, 1987.

At defendant's trial on the stealing charge, automobile salesman George identified the photograph of defendant that he had previously identified for Detective Schneedle. George also identified defendant in court as "Johnny," the person who test-drove the Galant that later was stolen. Defendant

> also was identified in court by the St. Louis police officer who arrested him while driving the Galant and the general manager of Kirkwood Mitsubishi. On the day of the theft, defendant approached the general manager in the dealership building and inquired about a Mitsubishi Galant on the parking lot. The manager directed defendant to the showroom floor and later saw him briefly in the new car showroom.

State v. McIntyre, 749 S.W.2d 420, 421 (Mo.App., E.D. 1988) (A-115-119). After respondent's conviction and sentence, respondent appealed to the Missouri Court of Appeals. Id. He raised a double jeopardy claim before that court based on **Brown v. Ohio**, 432 U.S. 161 (1977); however, the Missouri Court of Appeals affirmed the conviction and sentence (A-119-122). Respondent pursued no state post-conviction remedies.

On September 2, 1988, respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 (A-127).

After litigation before the district court, Magistrate David Noce filed his report and recommendation that the petition be denied (A-65). District Judge Edward L. Filippine adopted the recommendation (A-72).

On November 30, 1988, respondent filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) (A-137). The district court ordered petitioners to respond to the pleading (A-74). After further litigation, the magistrate again recommended that the petition be denied (A-80). The district court adopted the magistrate's report and recommendation (A-101). The district court denied respondent's request for a certificate of probable cause to appeal (A-103); however, the certificate was granted by the court of appeals (A-106).

On appeal before the court of appeals, petitioners asserted, inter alia, that review of the double jeopardy claim was barred under the retroactivity rules of **Teague v. Lane**, 489 U.S. 288 (1989). The court of appeals agreed that **Grady v. Corbin**, 495 U.S. 508 (1990), was a "new rule" under **Teague**, but that it fit within the first recognized exception to the **Teague** retroactivity doctrine (A-41-52). Citing **United States v. Felix**, 926 F.2d 1522 (10th Cir. 1991), rev'd, 112 S.Ct. 1377 (1992), the court of appeals determined that respondent's double jeopardy claim warranted relief (A-52-63). Petitioners' petition for rehearing or rehearing en banc was denied. This Court, however, granted the petitioners' petition for writ of certiorari and remanded the cause to the court of appeals. **Caspari v. McIntyre**, 112 S.Ct. 1658 (1992).

On remand, the court of appeals adhered to its original conclusion. Recognizing a divergence between its analysis and that of the Court of Appeals for the Second Circuit, the Court of Appeals for the Eighth continued to adhere to its belief that double jeopardy claims fall within the first exception of the **Teague** retroactivity doctrine (A-7 & n.2). The lower court also found that this case was not governed by this Court's opinion in **United States v. Felix** (A-7-27). Accordingly, the Court adhered to its decision to grant the writ of habeas corpus (A-2). Rehearing was denied. Rehearing *en banc* was also denied, but Circuit Judges Fagg and Beam voted to rehear the case *en banc* (A-126). The present petition for writ of certiorari ensues.

ARGUMENT

I.

Whether the rule of Grady v. Corbin, 495 U.S. 508 (1990), can be applied retroactively to a habeas corpus petitioner because the Double Jeopardy Clause's bar to a successive prosecution is a categorical guarantee of the Constitution.

To justify a grant of certiorari, petitioners must show a conflict between the lower-court opinion and opinions from other circuits or this Court. Alternatively, petitioners must show an important question of federal law which has not been, but should be settled by this Court. Supreme Court Rules 10.1(a), (c). The present case represents an opportunity for this Court to discuss the first exception to the **Teague** retroactivity rule. **Teague v. Lane**, 489 U.S. 288, 307 (1989) (new rule applying retroactively if it places certain kinds of primary,

private conduct beyond the power of government to proscribe). The present case also represents an opportunity to resolve the divergent opinions between the Courts of Appeals for the Second, Fifth and Eighth Circuits. Accordingly, the writ of certiorari should issue.

The Court of Appeals reconsidered the retroactivity issue in its September 4, 1992 opinion (App. 7). The court adhered to its analysis from its earlier opinion (App. 7, 41-52).

Petitioners and the lower court agree that respondent's request that the court apply the double jeopardy principles of Grady v. Corbin, 495 U.S. 508 (1990), was a request that the Court apply "new law" retroactively (A-42-44). The Grady rule was not "dictated" by a prior precedent when respondent's direct appeal became final in 1988; therefore, it was a "new rule" under Teague. See

Johnson v. Howard, 963 F.2d 342, 344 (11th Cir. 1992).

Petitioners and the lower court agreed that the second exception to Teague is inapplicable. The Double Jeopardy Clause concepts of Grady do not require the observance of procedures that are implicit in the concept of ordered liberty (A-45, quoting Teague v. Lane, 489 U.S. 288 (1989)). See Johnson v. Howard, 963 F.2d at 345.

Petitioners and the lower court diverge on the issue of whether the first exception to the Teague retroactivity doctrine is applicable. In Teague, this Court described that exception.

> [A] new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."

Teague v. Lane, 489 U.S. at 307, quoting Mackey v. United States, 401 U.S. 667,

692 (1971) (separate opinion of Harlan, J.).

There are three courts of appeals that have discussed this exception as it relates to double jeopardy claims brought forth by habeas corpus petitioners. The court below found applicable the first exception to the **Teague** doctrine. Citing **Penry v. Lynaugh**, 492 U.S. 302 (1989), the Court of Appeals for the Eighth Circuit found the Double Jeopardy Clause's prohibition against successive prosecution to be a categorical guarantee of the Constitution. (A-46-52). In **Johnson v. Howard**, 963 F.2d at 342, the Fifth Circuit agrees with the analysis of the Eighth Circuit in **McIntyre**.

On the other hand, the United States Court of Appeals for the Second Circuit, in **United States v. Salerno**, 964 F.2d 172 (2d Cir. 1992), expressly disagrees with the lower court's **McIntyre** opinion.

> As we have observed, **McIntyre** has been vacated and remanded by the Supreme Court for reconsideration in light of **Felix**. See, supra n.2. In any event, we disagree with the Eighth Circuit's analysis of [retroactivity].

Id. at 178. The **Salerno** court declined to apply **Grady** retroactively. Petitioners amply demonstrate a split of opinion by the three lower courts concerning the application of the first **Teague** exception.

The significance of this issue for the states in the Fifth and Eighth Circuits is perhaps manifested by the large number of criminal prosecutions, state and federal, that have arisen in these circuits. The significance is also clear for the states within the Eighth Circuit given that circuit court's propensity with habeas corpus cases to read expansively exceptions to this Court's rules prohibiting federal habeas corpus review.

See, e.g., **Sawyer v. Whitley**, 112 S.Ct. 2514, 2521 n.11 (1992) (rejecting Eighth Circuit's test for "probable actual innocence" exception to procedural default doctrine); **Simmons v. Lockhart**, 915 F.2d 372, 376 (8th Cir. 1990) (ineffective assistance of post-conviction counsel constituting cause). Petitioners believe that it is necessary for this Court to review and discuss its construction of the first exception to **Teague** rather than allow the Fifth and Eighth Circuits to infect themselves and perhaps other federal courts with an improper interpretation of that exception.

In **Teague**, the Court articulated the first exception to the retroactivity doctrine. Under that exception, a habeas applicant may rely on a "new rule" of law "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making

authority to proscribe.'" **Teague v. Lane**, 490 U.S. at 311. Of course, the **Teague** opinion quotes Justice Harlan's concurrence in **Mackey v. United States**, 401 U.S. at 692.

In **Mackey**, Justice Harlan identified several examples of this exception. Id. at 692 n.7. These examples include rules that preclude prosecution of (1) expressive conduct protected by the first amendment, **Street v. New York**, 394 U.S. 576 (1969); (2) silence protected by the fifth amendment, **Grosso v. United States**, 390 U.S. 62 (1968); (3) certain protected intimate behavior, **Loving v. Virginia**, 388 U.S. 1 (1967); **Griswold v. Connecticut**, 381 U.S. 479 (1965); and (4) conduct in the constitutionally protected privacy of one's home, **Stanley v. Georgia**, 394 U.S. 557 (1969).

Since the double jeopardy rule of **Grady** does not involve the

decriminalization of the offense of felony stealing, the first exception from **Teague** is simply inapplicable. The court of appeals appears to concede as much from its failure to discuss this **Teague** exception (A-46-52). Rather, the court of appeals almost immediately begins its discussion of **Penry v. Lynaugh**, 492 U.S. at 302.

A different aspect of the first **Teague** exception was discussed by this Court in **Penry**. In **Penry**, the Supreme Court extended the **Teague** doctrine to capital-sentence collateral proceedings. Accordingly, it was appropriate that the first **Teague** exception expand to the context of capital sentencing. Cf. **Sawyer v. Whitley**, 112 S.Ct. at 2514 (discussing "probable actual innocence" exception in capital-punishment habeas context).

The court of appeals accurately quotes the language from the **Penry** opinion (A-46). The court of appeals then goes on to quote language from **Butler v. McKellar**, 494 U.S. 407 (1990), for the proposition that the "first **Teague** exception [encompasses] '"categorical guarantees accorded by the Constitution" such as a prohibition on the imposition of a particular punishment on a certain class of offenders'" [sic]" (A-47-48, quoting **Butler v. McKellar**, 494 U.S. at 415). The court of appeals interprets the "such as" language as giving it a commission to create new exceptions to the **Teague** retroactivity rule.

Petitioners, however, believe it is clear that the "such as" language from this Court referred directly to the language from this Court that followed the "such as" language--that being "a prohibition on the imposition of a particular

punishment on a certain class of offenders." Petitioners also believe that this "such as" language refers to the "categorical guarantees accorded by the Constitution" that were discussed in the first aspect of the first **Teague** exception--the guarantees discussed by the Court in **Teague** and by Justice Harlan in **Mackey**.

This interpretation is logical since **Penry** extended **Teague** to the capital-sentencing situation. The first exception had to be modified slightly in order for it to make sense in a sentencing context. Of course, respondent's request for the application of the "new law" in **Grady v. Corbin** is unsupported by the plain words of **Teague**, **Penry** or **Butler**. The court of appeals provides no explanation for reading the language as something other than what this Court says it means.

This criticism is even more telling in light of the express language from this Court in **Saffle v. Parks**, 494 U.S. 484 (1990). In **Saffle**, the Supreme Court was quite clear as to the scope of the first exception to the **Teague** retroactivity rules:

> The rule sought by Parks would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons.

Id. at 495; see **Smith v. Black**, 904 F.2d 950, 986 (5th Cir. 1990), vac'd on other grounds, 112 S.Ct. 1463 (1992); **Wickham v. Dowd**, 914 F.2d 1111, 1115-16 (8th Cir. 1990), cert. denied, 111 S.Ct. 2897 (1991). Indeed, in **Wickham** the Court examined the new rule and determined that it did not protect the habeas petitioner due to his status or due to the nature of the offense. Id. Likewise, the **Grady** "new rule" does not prohibit punishment

for reasons of respondent's status or the nature of his offense.

If one were to assume that the previous analysis is incorrect and that this Court wishes the first **Teague** exception to apply to requests for "new law" that this Court has not yet listed, then petitioner suggests that the Double Jeopardy Clause protection discussed in **North Carolina v. Pearce**, 395 U.S. 711, 717 (1969), are not "categorical guarantees accorded by the Constitution" within the meaning of **Butler v. McKellar**. Those **Pearce** guarantees are the prohibition against the second prosecution for the same offense after acquittal, the protection against a second prosecution for the same offense after conviction, and the protection against multiple punishments for the same offense. Id. At least in the context of the successive-trial protections, the Double Jeopardy Clause's

protections are procedural in nature and are designed to ensure that the government litigates a criminal prosecution fully in the first trial.

The court of appeals discusses extensively the protection against multiple punishment with its **Teague** analysis (A-48-50). The rule in **Grady**, however, does not implicate the multiple-punishment protection of the Double Jeopardy Clause. See **United States v. Chippas**, 942 F.2d 498, 500 (8th Cir. 1991), quoting **United States v. Oritz-Alarcon**, 917 F.2d 651, 654 (1st Cir. 1990), cert. denied, 111 S.Ct. 2035 (1991). The rule in **Grady** implicates only the protections from successive trials, a procedural protection. Id. The court of appeals' language concerning multiple punishment is absolutely beside the point. Whether the first exception to the **Teague** retroactivity rule is implicated by the

multiple-punishment protection is an issue best left for a multiple-punishment-protection/double jeopardy case, not a successive-prosecution case.

> It seems to us that **Penry** effects a rather carefully limited expansion of the first "primary conduct" exception, and that **McIntyre** inappropriately puts **Grady** into the **Penry** category. The rules established in **Grady** does not immunize primary conduct from overall, or any specific, criminal punishment. Manifestly, the offenses for which Persico and Langella were convicted remain illegal after **Grady**. **Grady** would establish, at most, that their admittedly criminal conduct cannot be prosecuted in separate trials. This, we believe, is a procedural matter properly tested under the second, rather than first, exception to the prohibition against retroactive application of new rules.

United States v. Salerno, 964 F.2d at 178. The multiple-punishment protection is different than the multiple-prosecution protection. **North Carolina v. Pearce**, 395 U.S. at 717.

The court of appeals also refers the reader to some pre-**Teague** cases concerning the retroactive application of Double Jeopardy Clause decisions (A-50-52, citing **Robinson v. Neil**, 409 U.S. 505 (1973)). After **Robinson**, however, there has been a radical change in this Court's view of the Double Jeopardy Clause. This Court no longer believes that a double jeopardy claim deprives the trial court of "jurisdiction." Indeed, double jeopardy rights are now perceived as personal rights that a defendant may waive. See **United States v. Broce**, 488 U.S. 563 (1989) (waiver of rights by guilty plea). Given this change in attitude by this Court, the court of appeals' reference to **Robinson** and its underlying rationale is ill-founded.

In **United States v. Broce**, the Court declared that a defendant who has entered a plea of guilty to a criminal charge may

not assert a double jeopardy claim in a collateral attack upon the sentence. Id. at 570-72. Defendant Broce waived his right to challenge his conviction on double jeopardy grounds by entering the plea of guilty. Id. at 576; see **Taylor v. Whitley**, 933 F.2d 325, 328-29 (5th Cir. 1991), cert. denied, 112 S.Ct. 1678 (1992). Indeed, the lower court had held earlier that a valid plea of guilty waives a double jeopardy claim. **United States v. Connelly**, 503 F.2d 520 (8th Cir. 1974); **Harris v. United States**, 237 F.2d 274 (8th Cir. 1956). Respondent's "new rule" hardly constitutes a "categorical guarantee accorded by the Constitution." No aspect to the first exception to the **Teague** retroactivity doctrine is applicable.

Missouri and the other states located in the Eighth Circuit, as well as those located in the Fifth Circuit, are

faced with courts that wish to extend "categorical guarantees accorded by the Constitution" beyond the two situations discussed by this Court in **Teague** and **Penry**. Where will it stop? Missouri suspects that a variety of common constitutional claims may eventually become "categorical guarantees" within the Eighth Circuit unless this Court grants review. That the Fifth Circuit has adopted and other courts of appeals may adopt such an elastic reading of this Court's language is possible, if not probable. This Court's grant of a writ of certiorari will allow this Court to speak authoritatively upon this issue.

II.

Whether the Double Jeopardy Clause, as interpreted in **Grady v. Corbin**, 495 U.S. 508 (1990), (1) prohibits the introduction at trial of "evidence of other crime" where that crime has already been prosecuted or (2) prohibits the prosecution of a crime where evidence of that crime was adduced at an earlier trial as "evidence of other crime."

The court of appeals' September 4, 1992 opinion was issued after this Court had remanded the cause to the court of appeals for further consideration in light of **United States v. Felix**, 112 S.Ct. 1377 (1992). **Caspari v. McIntyre**, 112 S.Ct. 1658 (1992). The United States Court of Appeals for the Eighth Circuit again found that respondent's constitutional rights under the Double Jeopardy Clause were violated by his prosecution in the St. Louis County Circuit Court for

theft after he had been prosecuted in the St. Louis City Circuit Court for the offense of tampering (A-2). Under the circumstances of this case, respondent is unable to demonstrate a violation of his rights under the Double Jeopardy Clause.

In June, 1986, a jury in the Circuit Court of the City of St. Louis found respondent guilty of first-degree tampering under § 569.080, RSMo 1986, based on respondent's operation on November 24, 1985, of an automobile knowing that he acted without the owner's consent. In February, 1987, a jury in the Circuit Court of St. Louis County found respondent guilty of felony stealing under § 570.030, RSMo 1986, based on his stealing an automobile from a car dealership on November 22, 1985 (A-3). The issue is whether the Double Jeopardy Clause prohibited the second trial, the St. Louis County trial, for stealing. The answer

is clearly no, and the court of appeals' determination to the contrary creates a significant issue adversely affecting the prosecution of crime by the states and federal government within the Eighth Circuit.

Congress authorizes federal district courts to admit evidence of other crimes for limited purposes such as for proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake of accident. Federal Rule of Evidence 404(b). Under Missouri state law, such evidence is inadmissible unless it tends to establish motive, intent, absence of mistake or accident, common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other, or identity. See **State v. Kenley**, 693 S.W.2d 79, 81 (Mo. banc 1985), cert. denied, 475 U.S. 1098 (1986). The lower

court's opinion effectively prohibits a prosecutor from presenting evidence of other crimes for the jury to consider when the other crimes have been or will be the subject matter of a prosecution. This presents a significant question for this Court's discretionary review. Supreme Court Rule 10.1.

Distilled to its essence, the fact pattern in this case is simple. There are two separate and distinct crimes under Missouri law, *compare* § 569.080, RSMo 1986 (first-degree tampering), *with* § 570.030, RSMo 1986 (stealing), committed on two different days, November 22, 1985 (stealing), and November 24, 1985 (tampering), in two different jurisdictions, St. Louis County (stealing) and the City of St. Louis (tampering).

At respondent's first trial, respondent was convicted of the second crime, first-degree tampering. At this trial,

evidence about the first crime (stealing) was introduced as evidence of other crimes concerning respondent's state of mind. The ruling of the state trial court to admit this evidence was affirmed on direct appeal of the first trial.

> As an element of its case, the state was required to prove defendant knew he was operating the car without the consent of the owner. The evidence linking defendant with theft of the car tended to establish this knowledge on the part of defendant and thus was relevant. See, e.g., **State v. Remspecher**, 542 S.W.2d 24, 25 (Mo.App. 1976). The key question is whether the relevance of this question is outweighed by its possible prejudicial effect. **Caldwell**, supra at 494. The decision whether the potentially prejudicial effect of evidence outweighs its probative value is within the sound discretion of the trial court. **Shaw**, supra at 672. The trial court here properly exercised its discretion in admitting the evidence.

State v. McIntyre, 735 S.W.2d 111, 112 (Mo.App., E.D. 1987) (A-111). As should be clear, at the first trial petitioner

was prosecuted for the second crime, with evidence of the first crime being admitted as "evidence of other crimes," to help to demonstrate respondent's knowledge that he was operating the car without the consent of the owner.

Several months later, at respondent's second trial, he was prosecuted for the first crime, the offense of stealing. The trial court also admitted information about respondent's November 24th operation of a motor vehicle without the owner's consent. That information was admitted as evidence of other crimes to show respondent's purpose on November 22nd of withholding the vehicle permanently from the owner. Respondent did not even complain about the admission of evidence of other crimes during his direct appeal of the second trial. **State v. McIntyre**, 749 S.W.2d 420 (Mo.App., E.D. 1988) (A-115).

How did the lower court treat the "evidence of other crimes" issue? The court of appeals noted that its previous opinion, **McIntyre v. Trickey**, 938 F.2d 899 (8th Cir. 1991), was reversed and remanded for reconsideration in light of **United States v. Felix**, 112 S.Ct. 1377 (1992). **Caspari v. McIntyre**, 112 S.Ct. 1658 (1992). An examination of the **Felix** opinion indicates that it contains two substantive issues.

Part II of the **Felix** opinion discusses whether the government was foreclosed from prosecuting criminal charges because it had presented evidence of the events underlying the charges at a prior trial in order to help demonstrate the defendant's criminal intent. Id. at 1382. Relying on **Dowling v. United States**, 493 U.S. 342 (1990), the Supreme Court found the latter convictions proper since the government had not previously

prosecuted the defendant for those acts. Id. at 1383. The mere introduction of evidence of other crimes does not constitute a prosecution for those other crimes. Id. at 1383.

Part III of the **Felix** opinion discusses whether the prosecution for substantive crimes precludes a later prosecution for conspiracy using those crimes, along with others, as the overt acts of the conspiracy. Id. at 1383-85.

The panel extensively discusses the issues contained in Part III of the **Felix** opinion (A-13-24). In petitioners' opinion, however, the most significant part of **Felix**, Part II, was treated as a two-paragraph afterthought by the court of appeals (A-24-26).

The court of appeals discussed Part II of the **Felix** opinion for two paragraphs out of a multiple-page opinion. In the first paragraph of discussion,

paragraph two on page A-24, the court summarizes in four sentences Part II of the **Felix** opinion.

As its second paragraph of analysis, the court repeats its analysis from its 1991 opinion without application of **Felix** to the case (A-25, citing **McIntyre v. Trickey**, 938 F.2d at 906)). This hardly seems to be what this Court had in mind when it remanded the cause to the court of appeals for reconsideration of the 1991 opinion in light of **Felix**.

"The government, to establish essential elements of the stealing crime, proved conduct--operating an automobile without the owner's consent--for which McIntyre had already been prosecuted (A-25). Other than its citation to the previously vacated opinion, the court offers no authority for this sentence. Such is understandable since it is simply wrong.

At the second trial (stealing), evidence about the November 24 tampering was admitted as evidence of other crimes. Whether the government "proved conduct" is unknown since the jury was not required to find beyond a reasonable doubt--at the second trial--that respondent's November 24th conduct constituted first-degree tampering. At the second trial, the government had no burden of proving tampering conduct--certainly not beyond a reasonable doubt. The jury could have inferred respondent's mental state, that respondent took the car for the purpose of withholding it permanently from the owner, without evidence of the November 24th tampering conduct.

The State introduced evidence about the November 24 tampering, but there was no second prosecution for tampering.

> At the Missouri trial, the Government did not in any way prosecute Felix for the

> Oklahoma methamphetamine transaction; it simply introduced those transactions as prior acts evidence under Rule 404(b). The Government was therefore free to prosecute Felix in the trial below for the substantive drug crimes . . . .

United States v. Felix, 112 S.Ct. at 1383.

If Missouri's United States Attorney did not prosecute Felix for the Oklahoma crime when it introduced that evidence of other crimes, then the same should be true when a state prosecutor introduces evidence of other crimes even though there has already been a conviction. The **Felix** court noted that evidence of Missouri crimes--crimes for which Felix had already been prosecuted--was introduced at the Oklahoma prosecution. Id. at 1381. Neither the Court of Appeals for the Tenth Circuit nor the Supreme Court found a double jeopardy violation from this. **Felix** makes it clear that the

introduction of evidence of other crimes is not a prosecution; thus, at the second trial, the admission of evidence about tampering should not constitute a second prosecution for double jeopardy purposes.

The panel stated:

> Unlike **Felix**, the government here did not introduce conduct pertaining to a separate crime at the first trial simply to help prove an element of the crime charged; rather, the conduct the government proved constituted the entirety of the crime prosecuted at the first trial. Moreover, the same conduct was proved to establish nearly the entirety of the offense charged in the second prosecution.

[A-25-26.] This is exactly what is approved by this Court in **Dowling** and **Felix**. These cases allow the government to prosecute for Crime X with the admission of evidence concerning Other Crime Y. These cases then allow the government to prosecute for Crime Y with the admission of evidence concerning Other Crime

X. At this second trial, the government's case may constitute "the entirety of the crime prosecuted at the first trial" (A-26), and that is certainly authorized by the Supreme Court. Petitioners suspect that Mr. Felix's sense of deja vu was triggered when the Oklahoma federal trial court admitted evidence of crimes that had already been admitted as "bad acts evidence" at his earlier Missouri trial.

A hypothetical that is not a hypothetical illustrates the error with the court of appeals' opinion. Mr. Kenley went on a crime spree on January 3rd and 4th of 1984. See **Kenley v. Armontrout**, 937 F.2d 1298 (8th Cir.), cert. denied, 112 S.Ct. 431 (1991). In the midst of this crime spree, Mr. Kenley committed the capital murder of Ronald Felts, for which he was convicted and sentenced. **State v. Kenley**, 693 S.W.2d at 79. The

Missouri Supreme Court upheld the use at the murder trial of evidence of other crimes from that crime spree. The court found the evidence to be particularly probative of Mr. Kenley's mental state of deliberation and premeditation. Id. at 81-82. At the later trial for the multiple other crimes, the trial court admitted evidence of the murder, and the state court found this to be proper evidence of other crimes. **State v. Kenley**, 701 S.W.2d 185, 186 (Mo.App., S.D. 1985).

Under the court of appeals' opinion, the jury deliberating the other crimes charged would be denied access to the evidence of murder even though the State had no obligation to present the evidence of murder, had no obligation to prove the murder beyond a reasonable doubt, and the jury would receive no instructions about finding a murder. Of course, under

Dowling and **Felix**, there is no Double Jeopardy Clause violation.

Mr. Kenley received two trials due to § 565.004.1, RSMo 1986 (requiring severance of other crimes where state is seeking capital punishment for first-degree murder). Likewise, a state trial judge may order a severance of offenses for trial under Missouri Supreme Court Rule 24.07. That severance, however, under the court of appeals' opinion, may unfairly limit the State's proof of other crimes at the first trial since those crimes could not be prosecuted at a second trial.

A similar situation can occur when a defendant commits crimes in more than one county. Generally speaking, under Missouri procedure, venue is proper where the offense is committed or, if the offense is committed in more than one county, the venue is proper in any county

where an element of the offense occurred. See § 541.033, RSMo 1986. These statutes and rules, combined with the court of appeals' opinion, raises a variety of hypotheticals: What if a defendant commits a burglary in Kansas City, but when arrested, he possesses the stolen property in St. Joseph? The possession evidence would be significant at a burglary trial, and the burglary evidence would be significant at a possession trial. Under the court of appeals' opinion, the prosecutor cannot use the other-crimes evidence at whichever happens to be the first trial.

Should it matter if the arrest for retention occurred two hours after the burglary, two days after the burglary, two weeks after the burglary or two years after the burglary? The answer is no.

Even under an expansive reading of **Grady**, the Double Jeopardy Clause only

prohibits a second trial where one act or conduct gives rise to separate offenses. Under **Grady**, the separate offenses from one conduct may not be prosecuted consecutively. Additionally, under **Dowling** and **Felix**, when offenses arise on different days and from different conduct, the prosecutions can occur consecutively. In **Felix**, the court noted that the actual crimes were different in both time and place. **United States v. Felix**, 112 S.Ct. at 1382. The same is true in **McIntyre**: stealing on November 22nd in St. Louis County and tampering on November 24th in St. Louis City. Put another way, there is no common conduct that gives rise to the separate offenses.

Another hypothetical illustrates: Let us assume that the defendant commits first-degree murder in the City of St. Louis and he is later arrested while carrying the concealed weapon about his

person. It does not matter where this hypothetical defendant is arrested since, in Missouri, the carrying a concealed weapon offense could not be tried jointly with the first-degree murder. See § 565.004.1, RSMo 1986. Assuming the carrying a concealed offense occurred in Kansas City, would it make any difference that the offense occurred four hours after the murder, four days after the murder, four months after the murder, or four years after the murder? The answer should be no.

Another hypothetical illustrates: Let us assume a federal defendant robs a federally insured bank in Joplin, Missouri, and then robs a federally insured bank in Beggs, Oklahoma. Under the court of appeals' decision, if the federal Oklahoma prosecution occurred first, with the admission of the Missouri evidence, then a federal Missouri prosecution with

the Oklahoma evidence is barred by the Double Jeopardy Clause. Of course, this hypothetical should sound familiar because it is little different than **Felix**.

Petitioners submit that this discussion amply demonstrates the need for this Court to grant the petition for writ of certiorari. This case gives the Court an opportunity to clarify the relationship of **Dowling**, **Grady** and **Felix**. Petitioners submit that a grant of certiorari in this cause is necessary to effectuate Congress's intent with Federal Rule of Evidence 404(b) and the states' attempts at defining their laws concerning evidence of other crimes. This significant issue requires this Court's resolution.

CONCLUSION

Petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Of Counsel

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioners